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No. 03-763

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In The

# Supreme Court of the United States

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VIDEO PIPELINE, INC.,

*Petitioner,*

v.

BUENA VISTA HOME ENTERTAINMENT, INC. AND MIRAMAX FILM CORP.

*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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# REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## Introduction

This case presents important and unresolved issues arising from the tension between a copyright holder's limited exclusive rights under 17 U.S.C. §106 and the public's right to create and use comprehensive research and information guides that incorporate brief examples of copyrighted materials protected by the fair use doctrine in accordance with 17 U.S.C. §107. Petitioner Video Pipeline made and incorporated 62 brief samples ("clip previews") from Respondents' full length home videos into its comprehensive guide to movies and home videos, indexed to enable people to search for, and watch, a specific preview via the Internet when they need information about a movie or home video. Respondents claimed that Video Pipeline's use of the clip previews infringed their copyrights. The district court held that Video Pipeline's use of the clip previews was not a fair use under §107 and constituted copyright infringement under §106. The Court of Appeals affirmed the district court's decision.

In opposing Video Pipeline's petition for a writ of certiorari, Respondents misstate facts, gloss over the direct conflict among the Third, Seventh, and Ninth Circuits, and raise immaterial procedural objections. The issues raised by the Third Circuit's extraordinary holding (any use that provides information about copyrighted material and, in so doing, promotes the copyrighted material, is unprotected by § 107's fair use provision) are vitally important to the public that uses research guides which incorporate brief examples of copyrighted materials, particularly in light of emerging technologies that now provide people with access to vast information resources. This is an important question of federal law which has not been, but should be, settled by this Court. Respondents' brief contains no real arguments to the contrary.

## I. The Record and the Decisions Below Continually Raised the Question Presented by the Petition.

The question presented is whether using brief samples of full-length copyrighted audio-visual works -- which do not reveal the "heart" of the full-length works, and which are incorporated into a comprehensive interactive reference catalog via the Internet -- is a fair use under 17 U.S.C. § 107.

In their desire to have the Court not hear this important issue, Respondents repeatedly claim that this question had not been presented to the courts below.[1] Respondents' contentions are utterly false. Video Pipeline consistently and explicitly provided evidence and arguments to the courts below that its service is a comprehensive interactive reference catalog. (*Transcript of August 10, 2001 Preliminary Injunction Hearing before District Court* at 101-03, 105-07, 111-21, 128-32 (providing a detailed description of Video Pipeline's interactive reference catalog of movies); *Video Pipeline's Post-Hearing Brief* (August 31, 2001) at 4-5 ("[T]he character and purpose of VideoPipeline.net is not to be aesthetic, but to be comprehensive and functional in cataloging data and improve retailers and consumers' access to previews on the Internet.")). Although the district court's fair use analysis did not give any weight to the fact Video Pipeline's index improved access to images on the Internet and benefitted the public by enhancing information-gathering techniques on the Internet, the court acknowledged those facts. (44a-46a, 48a, 55a-56a). *See also Video Pipeline's Brief to*

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[1] Respondents' Brief in Opposition at 10-15 (Video Pipeline "now attempts to 'reinvent' its case as something heretofore unknown in the proceedings;" Video Pipeline "brings to this Court a theory that was not presented to the Court of Appeals.").

*United States Court of Appeals for Third Circuit*, July 31, 2002, at 32-33 ("Video Pipeline uses the Clip Previews as part of the database of information provided to retailers and the public... Video Pipeline's database using the Clip Previews promotes the full-length home videos (and the copyright holder's interest) and benefits the public interest by providing information.").

Respondents' assertion that Video Pipeline is bringing to the Court a theory that was never presented to the lower courts is blatantly false and should be disregarded.

## II. The Circuit Courts Are in Direct Conflict As to the Fair Use of Copyrighted Materials in Research Guides.

Respondents attempt to gloss over the conflict between the Third Circuit's decision and the Seventh Circuit's Ty decision[2] and the Ninth Circuit's Arriba Soft decision.[3] Both the Seventh and Ninth Circuits' fair use analysis addressed the threshold issue of the challenged use's function to establish a context in which to apply § 107. In contrast, the Third Circuit's analysis fails to account for the completely different functions served by Video Pipeline's indexed guide and Respondents' full-length home videos, and arrives at a completely different (and erroneous) analysis and result under § 107. To highlight the conflict, one need only to observe that a person in the Seventh or Ninth Circuits, using brief samples of copyrighted materials – no more than necessary – in an

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[2] Ty, Inc. v. Publications Int'l Ltd., 292 F.3d 512 (7th Cir. 2002), cert. denied, 537 U.S. 1110 (2003).

[3] Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).

organized index to improve access to information about the copyrighted materials is protected by the fair use doctrine in accordance with the Ty and Arriba Soft decisions. A person in the Third Circuit, however, doing exactly the same thing, is now subject to the Copyright Act's draconian statutory penalties for copyright infringement.

Because the Internet is comparable to a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services[4] throughout this country (and the world), a uniform approach to fair use analysis is urgently needed. Such essential uniformity is now clearly lacking.

Even within this case, uniformity has been lacking as the district court's and the court of appeals' fair use analyses conflicted with each other. Regarding § 107's third non-exclusive factor (the amount and substantiality of the portion used in relation to the copyrighted work as a whole), the district court decided that factor weighed against fair use (51a), while the court of appeals decided that factor favored fair use (16a). Additionally, regarding § 107's fourth non-exclusive factor (the effect of the use upon the potential market for or value of the copyrighted work), the district court decided that factor to be neutral, although it determined the market for the full-length films may be enhanced by Video Pipeline's service because it tended to promote the films to a broadened market of potential customers who might otherwise be unaware of, or unattracted to, the films (53a). In contrast, the court of appeals determined that factor weighed against fair use (19a). Such differences demonstrate the inconsistencies that now plague courts' fair use analyses.

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[4] Reno v. American Civil Liberties Union, 521 U.S. 844, 853, 863 (1997).

## III. An Erroneously Granted Preliminary Injunction, Based on A Distorted Analysis of the Fair Use Doctrine, Is the Proper Subject For a Writ of Certiorari.

Respondents claim that this case presents no occasion to depart from the "prudential rule" against certiorari review of interlocutory orders. Respondents' argument misses the mark for several reasons.

First, no such "rule" exists.[5] To the contrary, the Court has granted certiorari to review courts' decisions granting preliminary injunctions, often reversing the erroneously issued preliminary injunctions. *See Frisby v. Schultz*, 487 U.S. 474, 478-79 (1988) (certiorari granted to review preliminary injunction because further proceedings would not assist the Court's resolution of the substantially important issue); *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 534 (1987) (certiorari granted; preliminary injunction erroneously granted). *See also Mazurek v. Armstrong*, 520 U.S. 968, 971(1997) (certiorari granted based on parties' stipulations, prior to preliminary injunction hearing).

Moreover, the court of appeals and the district court have recognized that the question presented is ripe for review by staying all proceedings pending the Court's resolution of the underlying fair use issue now presented. The Third Circuit stayed issuance of the certified judgment in lieu of a formal

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[5] The authority cited by Respondents contradicts their argument. *See* 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 4036 at 27 (1988)("Certiorari is available to review court of appeals disposition of openly interlocutory appeals in such settings as review of preliminary injunction orders...").

mandate until the petition for a writ of certiorari was filed,[6] and the district court administratively terminated the case pending determination by the Supreme Court of the petition for a writ of certiorari.[7] By staying all proceedings, the courts acknowledged that (a) no further proceedings are necessary to assist the Court in addressing the fair use issue; and (b) resolving the fair use issue is critical to the courts' future proceedings. For the reasons detailed in Video Pipeline's Brief, the fair use question presented by this case is vitally important to persons creating research indexes and to the public that uses them. No reason exists to postpone review of the important fair use issue.

## IV. The Court of Appeals' Decision Reflects an Analysis That Is Contrary to the Copyright Act's Purpose.

According to the court of appeals' reasoning, using any amount of copyrighted material, no matter how minimal, to inform the public about the copyrighted work cannot be a fair use because such a use supersedes the copyright holder's exclusive right to create promotional materials from the work.[8] Contrary to Respondents' claim that the court of appeals' decision reflects a "straightforward application of well-established principles,"[9] the court of appeals' analysis incorrectly disregards the functions and use of Video Pipeline's indexed catalog. Thus, the court's analysis misses

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[6] Order, October 10, 2003.

[7] Order, December 11, 2003.

[8] App. 17a.

[9] Brief in Opposition at 21.

the simple fact that the index of brief samples cannot substitute for the full-length home videos or any derivative work. An index of brief samples is not a derivative work as defined by the Copyright Act and cannot be a substitute for a derivative work. Rather than a "straightforward application of well-established principles," the lower court's decision is contrary to the Court's mandates concerning the fair use doctrine,[10] expands without justification the scope of "derivative works" under the Copyright Act, sets a precedent that devastates research guides containing copyrighted materials, and suppresses information at the public's expense.

## Conclusion

The issues arising from the court of appeals' fair use decision are critically significant to the vast and rapidly growing number of persons who are using copyrighted textual and audio-visual materials for research on the Internet, and to those persons who are attempting to fairly use copyrighted materials in accordance with the Copyright Act -- without infringing another's copyrights. Resolving the issues will have broad implications for how brief samples of copyrighted materials will be used on the Internet, a use which will continue to grow quickly and inevitably. Moreover, as this case demonstrates, the issues presented are subject to conflict and confusion among lower courts which will frequently be addressing fair use issues in the future, particularly in light of developing technologies.

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[10] Sony Corp. v. Universal City Studios, 464 U.S. 417, 429 (1984); Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994) (copyright law ultimately serves the purpose of enriching the general public through access to creative works).

Recently, the Court relied upon the existence of a strong fair use doctrine by noting that the fair use doctrine allows the public to use a copyrighted expression itself "in certain circumstances."[11] This case is clearly one of those circumstances, and guidance from the Court is necessary at this time.

Respectfully submitted,

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[11] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).